

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

SANTIAGO FLORES,

Defendant and Appellant.

B227042

(Los Angeles County
Super. Ct. No. BA360080)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald H. Rose, Judge. Affirmed as modified.

Dennis L. Cava, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant, Santiago Flores, of attempted willful, deliberate and premeditated murder (Penal Code,¹ §§ 187, subd. (a), 664, subd. (a)) and found it was committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(C).) The jury further found defendant discharged a firearm in the commission of the offense. (§ 12022.53, subds. (b), (c).) Defendant was sentenced to life with the possibility of parole plus 30 years. Defendant argues there was insufficient evidence of attempted murder and premeditation. Defendant further asserts it was fundamentally unfair for the prosecutor to renege on an agreement to instruct on a lesser related offense. We affirm the judgment but modify the sentence to delete the 10-year enhancement imposed under section 186.22, subdivision (b)(1)(C) and to impose a 15-year wait for release on parole.

II. THE EVIDENCE

A. The Prosecution Case

On August 1, 2009, Erick Perez was returning home from an errand around 11 p.m. He was approached by five “cholos” yelling a gang name. One of the five young men spoke to Mr. Perez. Mr. Perez was asked where he was from. Mr. Perez said he was not from anywhere. Mr. Perez said he lived there. Defendant pulled a gun from his waistband. Defendant pointed it at Mr. Perez. Defendant fired a shot and Mr. Perez ran. A chase ensued. The five assailants chased Mr. Perez. As he was running, Mr. Perez heard four more shots. Defendant lived near Mr. Perez. Mr. Perez had seen defendant in the neighborhood. Mr. Perez admitted he had been convicted of a felony in 2005 and of a misdemeanor.

¹ All further statutory references are to the Penal Code.

Mr. Perez's girlfriend, Brenda Santoyo, testified. She heard Mr. Perez returning home. She looked out a window and saw "gang members" screaming out their affiliation. She ran outside and told the assailants to leave Mr. Perez alone. Ms. Santoyo recognized defendant. He lived near her. Defendant had dated a woman Ms. Santoyo knew. Ms. Santoyo saw defendant pull a gun from his waistband. She saw his face clearly. He looked straight at her. He had two green tattoos next to his eyes. Defendant chased Mr. Perez as he was running away. Ms. Santoyo saw a gun in defendant's hand. She heard five shots. Ms. Santoyo acknowledged she had been convicted of a felony in 2009.

Shortly after the shooting, Detective Jorge Cervantes and a partner detained five Latinos who matched the suspects' descriptions. Defendant was one of the five Latinos. At a field show-up, Mr. Perez identified defendant. However, he was not able to identify any of the other four men. Mr. Perez's identification was based on defendant's face and clothing. Also at the field show-up, Ms. Santoyo identified all five Latinos, including defendant. At trial, Mr. Perez was initially hesitant to make an in-court identification of defendant. Mr. Perez admitted he was afraid to testify. Mr. Perez subsequently identified defendant as the person who fired the gun.

Officer Joseph Fransen testified concerning defendant's gang. Defendant was an admitted member of a local gang. He had a gang moniker. The shooting occurred within the gang's territory. Defendant's gang engaged in: attempted murders; shootings; firearm assaults; grand theft of automobiles; firearms possession; and possession of narcotics for sale. Officer Fransen testified the shooting was committed for the gang's benefit.

B. Defense Evidence

James Belknap, an investigator, and Angelina Villegas, Mr. Perez's neighbor, both testified the lighting in the area of the shooting was poor. Additionally, Ms. Villegas

testified that at the time of the assault, she heard a voice. The voice she heard did not sound like defendant's.

III. DISCUSSION

A. Sufficiency Of The Evidence

Defendant argues the evidence was insufficient to sustain his attempted murder conviction and the deliberate, willful and premeditated finding. We disagree. Defendant, a member of a violent gang, was armed with a loaded handgun. He was in the company of four fellow gang members. They accosted Mr. Perez. They announced their gang affiliation. They asked where Mr. Perez was from. Without provocation, defendant pulled out a gun, aimed it at Mr. Perez and fired. During the ensuing chase, defendant fired his weapon four more times. Viewing the evidence in the light most favorable to the judgment, this was substantial evidence defendant committed a willful, deliberate and premeditated attempted murder. (See *People v. Brady* (2010) 50 Cal.4th 547, 561-565; *People v. Sanchez* (2001) 26 Cal.4th 834, 849-851.)

B. The Jury Instruction Discussions

Defendant argues the prosecutor reneged on an agreement to instruct the jury on assault with a deadly weapon as a lesser related offense. Defendant asserts this violated his due process rights. As defendant concedes, he did not raise this argument in the trial court. As a result, it has been forfeited. (See *People v. Weaver* (2012) 53 Cal.4th 1056, 1082; *People v. Fuiava* (2012) 53 Cal.4th 622, 726-727.) Moreover, the accused has no right, absent the prosecution's acquiescence, to a lesser related offense instruction. (*People v. Nelson* (2011) 51 Cal.4th 198, 215; *People v. Birks* (1998) 19 Cal.4th 108, 136.) Our Supreme Court has repeatedly held that this rule does not violate a defendant's due process rights under the federal or state Constitutions. (*People v. Nelson, supra*, 51

Cal.4th at p. 215; *People v. Taylor* (2010) 48 Cal.4th 574, 622; *People v. Rundle* (2008) 43 Cal.4th 76, 146-148, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Therefore, trial counsel was not ineffective for failure to object on due process grounds. (See *People v. Moore* (1990) 224 Cal.App.3d 234, 240; see generally, *In re Lucas* (2004) 33 Cal.4th 682, 721-722.) And nothing precluded the prosecutor from changing a tentative decision on the jury instructions to be given. (See *People v. Hall* (2011) 200 Cal.App.4th 778, 781-782.) Defendant has not cited any authority that compels a contrary conclusion. Moreover, the evidence against defendant was very strong. The defense centered on misidentification. The jury clearly resolved that issue against defendant. It is not reasonably probable the verdict would have been more favorable to defendant had the jury received the lesser related offense instruction. (Cal. Const., art. VI, §13; *People v. Hall, supra*, 200 Cal.App.4th at p. 783.)

C. The Gang Enhancement

Defendant correctly contends it was error to impose a consecutive 10-year term under section 186.22, subdivision (b)(1)(C). (*People v. Lopez* (2005) 34 Cal.4th 1002, 1007, 1011; *People v. Camino* (2010) 188 Cal.App.4th 1359, 1381-1382.) The sentence must be modified to delete that 10-year term. The abstract of judgment must be amended accordingly.

D. Duration Of Indeterminate Term

The oral pronouncement of judgment states defendant received a life term plus 20 years of enhancements. The correct indeterminate sentence is a life term *with* a minimum 15-year wait for parole eligibility. (§ 186.22, subd. (b)(5); *People v. Lopez, supra*, 34 Cal.4th at pp. 1004-1005.) The Attorney General argues the sentence must be corrected to state there is a 15-year minimum parole date (and delete the gang enhancement). We agree. The abstract of judgment fails to state the duration of the indeterminate term. The

abstract of judgment must be corrected to state defendant was sentenced pursuant to section 186.22, subdivision (b)(5) and is subject to a 15-year minimum wait for parole eligibility.

IV. DISPOSITION

The sentence is modified to delete the 10-year term imposed under Penal Code section 186.22, subdivision (b)(1)(C). The sentence is further modified to reflect a life term with a 15-year parole eligibility wait. Upon remittitur issuance, the clerk of the superior court must amend the abstract of judgment and deliver a copy to the California Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.